IN THE

Supreme Court of the United States

October Term, 1973

No. 73-364

ROGERS C. B. MORTON,
Secretary of the Interior, *et al.*,
Appellants,

and

AMERIND,
Intervenor-Appellant,

vs.

C. R. MANCARI, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BRIEF OF MONTANA INTER-TRIBAL POLICY BOARD, NATIONAL CONGRESS OF AMERICAN INDIANS, AND NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION, AS *AMICI CURIAE*

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BRIEF OF *AMICI CURIAE*

Interest of *Amici Curiae*

The interest of the *amici curiae* is set forth in the motion to which this brief is appended.

Statement of the Case

This action was brought by appellees, four non-Indian employees of the Bureau of Indian Affairs ("the BIA"), on behalf of themselves and all other non-Indian employees of the BIA. The action sought to enjoin the BIA and the Secretary of the Interior from implementing and enforcing those laws giving preference to qualified Indians in initial hiring, training, promotion, and reinstatement for positions in the BIA.[1] Appellees argued that the laws were being interpreted too broadly in that they should apply to initial hiring only; that enforcement of the laws violated their rights under the Civil Rights Act of 1964,[2] as amended by the Equal Employment Opportunity Act of 1972;[3] and finally, that the Indian Preference statutes are unconstitutional because they deprive non-Indians of their rights to property without due process of law in violation of the Fifth Amendment to the United States Constitution.

The judgment of the District Court for the District of New Mexico was entered on June 1, 1973. In a memorandum opinion the court held that the Indian Preference statutes had been impliedly repealed by the Equal Employment Opportunity Act of 1972. *Mancari* v. *Morton*, 359 F. Supp. 585 (D. N. M. 1973). Ignoring the long history of the Indian Preference statutes and specifically rejecting the special responsibility of Congress towards the Indian tribes pursuant to the constitutional mandate of Article I, Section 8,[4] the court below concluded:

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[1] 25 U. S. C. §§ 44, 45, 46 and 472 [hereinafter sometimes referred to as "the Indian Preference statutes"].

[2] 42 U. S. C. §§ 2000e, *et seq.*

[3] P. L. 92-261, 86 STAT. 103 (1972).

[4] 359 F. Supp. at 591.

> On its face, [the Equal Employment Opportunity Act] applies to all agencies of the federal government. There is nothing in the Committee Report or in House Report No. 92-238 [on the Equal Employment Opportunity Act], which would indicate that the Bureau of Indian Affairs be excepted from its provisions. (359 F. Supp. at 589)

The purpose of this brief *amici curiae* is to demonstrate that the district court's decision is contrary to well established principles of statutory construction, and that there are long-standing, legitimate and constitutional reasons for a congressional grant of preference to Indians for positions within the BIA which are not inconsistent with the purposes of the Equal Employment Opportunity Act.

Summary of Argument

If the court below had looked beyond the mere language of Indian Preference statutes and the Equal Employment Opportunity Act, it would not have concluded that the former were impliedly repealed by the more recent legislation. The Indian Preference statutes are not intended to discriminate on the basis of race, but rather to implement a long-standing congressional policy of encouraging the participation of Indians in the government of their own affairs This congressional policy is fully within Congress' constitutional authority to regulate the affairs of the Indian tribes.

Argument

The court below disregarded a basic principle of statutory construction in reaching the conclusion that Congress has repealed the Indian Preference statutes by implication. As this Court has often noted, "[i]t is a cardinal

principle of construction that repeals by implication are not favored." *United States* v. *Borden Co.*, 308 U. S. 188, 198 (1939); quoted with approval in *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 357 (1963) and *Jones* v. *Mayer Co.*, 392 U. S. 409, 437 (1968). Furthermore, statutes and treaties dealing with the Indians should be construed "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." *Tulee* v. *Washington*, 315 U. S. 681, 684-85 (1942).

Nevertheless, the district court concluded that there was an implied repeal of the Indian Preference statutes by the Equal Employment Opportunity Act of 1972, relying only on the extremely broad language of the 1972 Act and Congress' failure to exclude the BIA from its operation in express terms. Neither of these factors are relevant to the issue of implied repeal.[5] There is nothing in the legislative history of the Equal Employment Opportunity Act which indicates that Congress intended to deal with Indian affairs—a subject which is Congress' special constitutional responsibility.[6]

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[5] The district court also erroneously concluded that "Indians as such are not considered to have rights, so far as here pertinent, different from other citizens; . . ." 359 F. Supp. at 591. It is well established that "the mere fact that citizenship has been conferred upon Indians does not necessarily end the right or duty of the United States to pass laws in their interest as a dependent people." *Hallowell* v. *United States*, 221 U. S. 317, 324 (1911); see F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 156-157 (1942) (U. New Mexico Press reprint 1971) [hereinafter cited as "F. COHEN"].

[6] U. S. CONST. art. I, § 8, cl. 3: "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." Congressional authority is also inherent in the federal government's ownership of the land which tribal units occupy. *See Johnson & Graham's Lessee* v. *McIntosh*, 21 U. S. (8 Wheat.) 543, 590-91 (1823); *United States* v. *Kagama*, 118 U. S. 375, 380 (1886).

Read literally, and without regard to the disparate purposes of the two statutes, the Equal Employment Opportunity Act may appear to conflict with the Indian Preference statutes. In relying so heavily on the language of the statutes, however, the court below erred by failing to take into account the history and purpose of the Indian Preference statutes, the unique constitutional status of Indians, and the context in which the more recent legislation was enacted. As Justice Frankfurter remarked: "If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded."[7]

The long history of Indian Preference statutes and the unique role of the BIA in furthering the efforts of Indians toward self-government, must all be considered relevant to ascertain the intention of Congress. Considered against this background, it seems clear that if Congress had intended to reverse this century-old policy, it would not have left the matter to implication, but would have done so expressly. Further, if Congress had so intended, it is indeed remarkable that no hint of any such intention is present in any of the legislative history of the 1972 statute.

Statutes recognizing the special status of Indians by establishing a preference for them in positions in the Indian Service have a history going back 140 years. The first important preference statute for Indians was enacted in 1834 to give Indians preference in appointment to positions as "interpreters or other persons employed for the benefit of the Indians, . . . if such can be found, who are properly qualified for the execution of the

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[7] F. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 541 (1947).

duties."[8] Since 1834, Congress repeatedly enacted preference legislation, emphasizing its desire to increase the representation of Indians in the Indian Service. Five subsequent statutes creating Indian preferences for employment in various positions within the Indian Service,[9] culminated in Section 12 of the Wheeler-Howard Indian Reorganization Act of 1934, 25 U. S. C. § 472, 48 Stat. 986 (1934), which provides:

> The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

Given the cultural, linguistic and historical differences between Indians and other Americans, the preference for Indians in employment for the benefit of Indians would seem to follow as a matter of common sense. Nevertheless, there is a more compelling congressional purpose behind these statutes.

Treaties with the Indians and federal laws dealing with them have long recognized that Indians have retained

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[8] Act of June 30, 1834, 4 Stat. 735, 737, 25 U. S. C. § 45.

[9] See Act of March 3, 1875, 18 Stat. 420, 449; Act of March 1, 1883, 22 Stat. 433, 451; General Allotment Act of February 8, 1887, 24 Stat. 388, 389-90; Act of August 15, 1894, 28 Stat. 286, 313, 25 U. S. C. § 44; and others. See F. COHEN 160.

their inherent powers of sovereignty.[10] This Court has long recognized that Indians are a "people distinct from others." *The Kansas Indians*, 72 U. S. (5 Wall.) 737, 755 (1867), cited with approval in *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 169 (1973). The Bureau of Indian Affairs, the major instrumentality established by federal law to protect the resources of the Indian people, is unique in that it is the only federal agency constitutionally established to govern the affairs of a specific and distinct group of people.[11] Yet the employees of the BIA are neither elected nor appointed by Indians they serve and govern.

One of the primary purposes of the Indian Preference statutes is to give Indians some measure of control over their own self-government by making the BIA an agency composed of Indians. Even the most cursory examination of the legislative history of the Indian Preference statutes reveals that they are not intended to provide more jobs for a particular minority group, but that they

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[10] *Worcester* v. *Georgia*, 31 U. S. (6 Pet.) 515, 559 (1832): "The Indian nations had always been considered as distinct, independent, political communities, retaining their original-natural rights . . . from time immemorial . . ." See also, *The Indian Battle for Self-Determination*, 58 CALIF. L. REV. 445 (1970).

[11] *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1819-20 (1968): "The BIA possesses final authority over most tribal actions as well as over many decisions made by Indians as individuals. . . . Although the normal expectation in American society is that a private individual or group may do anything unless it is specifically prohibited by the government, it might be said that the normal expectation on the reservation is that the Indians may not do anything unless it is specifically permitted by the government." *See also*, F. COHEN *supra*, at 175; Zimmerman, *The Role of the Bureau of Indian Affairs Since 1933*, 311 ANNALS 31, 33 (1957).

are a very important aspect of an express congressional policy in favor of Indian self-determination.[12]

Senator Wheeler, one of the sponsors of the 1934 Preference statute, described the purpose of the legislation as being "to impose upon the Indians self-government in their own affairs," and, "further to give the Indians the control of their own affairs and of their own property."[13] Representative Hastings, commenting on the bill, declared: ". . . I believe that practical knowledge of Indians and sympathy with them will enable Indian employees to give more beneficial service."[14] The Commissioner of Indian Affairs, John Collier, testified that it was "the chief object of the bill to terminate such bureaucratic authority [as presently existed] by transferring the adminstration of the Indian Service to the Indian communities themselves."[15]

Indians have for many years been frustrated in their efforts to attain self-determination, but there have been recent indications of change. In a recent message to

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[12] The policy implemented by the Indian Preference statutes is one of Indian self-determination rather than racial discrimination. It has long been recognized that statutes may treat Indians differently than non-Indians when necessary to serve the legitimate congressional power to regulate Indian tribal relations and property. See, *Simmons* v. *Eagle Seelatsee*, 244 F. Supp. 808, 813-815 (E. D. Wash. 1965), *aff'd per curiam*, 384 U. S. 209 (1966). The Indian Preference statutes are not based upon a racial classification, but rather upon the mandate of Article 1, Section 8, Clause 3 of the United States Constitution.

[13] 78 CONG. REC. 11123, 11125 (1934) (Remarks of Sen. Wheeler).

[14] 78 CONG. REC. 9270 (1934) (Remarks of Rep. Hastings).

[15] Hearings on H. R. 7902, House Comm. on Indian Affairs, 73rd Cong. 2d Sess., at 22 (1934). See also *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 961-969 (1972).

Congress, President Richard Nixon asserted that "the time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."[16]

Many Indian tribes are moving toward the self-determination and greater exercise of tribal sovereignty Congress intended. However, for a long time to come they will be subject, in some degree or another, to the authority of the BIA and the Department of Interior. As long as non-Indians occupy management-level and policy making positions within the BIA, Indians will not be able to exercise that control of their own destinies envisioned by Congress.

The special position of the BIA in relation to the Indian can not be overemphasized:

> From birth to death [the Indian's] home, his land, his reservation, his schools, his jobs, the stores where he shops, the tribal council that governs him, the opportunities available to him, the way in which he spends his money, disposes of his property, and even in the way in which he provides for his heirs after death—are all determined by the Bureau of Indian Affairs acting as the agent of the United States Government.
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> . . . The Bureau must then be comprehended as a system permeating every dimension of Indian life and every element of Indian activity. More than

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[16] The American Indian—Message from the President of the United States. 116 CONG. REC. 23131, 23132, (July 8, 1970) [cited hereinafter as "President's Message"].

> just the sum of its parts or an aggregate of responsibilities, the relationships between the Indians and the Bureau of Indian Affairs together comprise a total and separate world.[17]

How has the Indian fared in this relationship? After more than a hundred years of BIA control of Indian education, Indians under federal supervision have an average education level of only five school years.[18] After more than a hundred years of federal responsibility for Indian health care, Indians have the highest infant mortality rate in the land and Indian life expectancy is nearly one-third shorter than the national average.[19] After more than a hundred years of BIA management of the Indian's wealth, particularly his land, the average Indian's yearly income is half the national poverty level.[20]

While there may be many reasons why the BIA has failed in its role as guardian of the Indians, one is certainly the presence of substantial numbers of non-Indians in positions of responsibility and authority. Despite the presence of sincere, dedicated civil servants, the BIA is not responsive to the special needs and desires of the people it is supposed to serve.

Congress' repeated enactment of Indian Preference statutes have been largely ignored by the BIA and, as

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[17] E. S. CAHN and D. W. HEARNE, OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA 5-6 (1969) (hereinafter "CAHN & HEARNE").

[18] *See* CAHN & HEARNE *supra*, 27-54; President's Message, 116 CONG. REC. 23133.

[19] *See* CAHN & HEARNE *supra*, 55-67; President's Message, 116 CONG. REC. 23134.

[20] *See* CAHN & HEARNE *supra*, viii, 68-111; President's Message, 116 CONG. REC. 23134. See also *Indians: Better Dead than Red?*, 42 CALIF. L. REV. 101, 115-119 (1969).

a result, the Indian service agencies have historically been dominated by non-Indians.[21] It has traditionally been non-Indians who have administered and governed the day-to-day lives of people in a society they can never fully understand.

Non-Indian teachers know little about the history, culture and social conditions of the pupils they teach.[22] Non-Indian employees of the BIA, who may be highly qualified and dedicated to helping the Indian people, do not fully understand the Indian's behavior and thinking. "Ultimately, the only persons with an enduring interest in making the Bureau more responsive are the Indians."[23]

Recently, Indians were successful in challenging the BIA's very narrow interpretation of the Indian Preference statutes which had kept the vast majority of Indian employees of the BIA in lower paying and less responsible positions while non-Indians comprised 80 per cent of the upper-echelon management, supervisory, and technical positions. In *Freeman* v. *Morton*, Civil No. 327-71 (D. D. C. Dec. 21, 1971), the District Court for the District of Columbia held that the Indian Preference statutes applied, without exception, to "all initial hirings, promotions, lateral transfers and reassignments."

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[21] *See* W. E. WASHBURN, RED MAN'S LAND—WHITE MAN'S LAW 208 (1971).

[22] Many teachers in BIA schools "still see their role as that of 'civilizing the native.' . . . One consequence of this unfortunate situation is a serious communication breakdown between student and staff and a serious lack of productive student-staff interactions." Indian Education: A National Tragedy—A National Challenge, S. Rep. No. 91-501, 91st Cong. 1st Sess., 61 (1969). See *New Rider* v. *Board of Education*, —— U. S. ——, 94 S. Ct. 733, 736 (1973) (Douglas, J., dissenting).

[23] CAHN & HEARNE *supra*, 155; *see generally*, *id.* at 147-155.

In speaking for the Indian Preference legislation of 1934, Representative Howard then promised:

> Indian progress and ambition will be enormously strengthened as soon as we adopt the principle that the Indian Service shall gradually become, in fact as well as in name, an Indian service predominately in the hands of educated and competent Indians.[24]

Recent events have raised the hopes of Indians that the long promised self-government and self-determination are at hand. The judgment of the district court in this case, if sustained, would once again dash those hopes.

The only thing that can be said in favor of the decision below is that it is consistent with a long history of broken promises made by the white man to the original citizens of this land.[25] It will be unfortunate for all Americans if this policy is allowed to continue.

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[24] 78 CONG. REC. 11731 (June 15, 1934) (remarks of Rep. Howard).

[25] See W. E. WASHBURN *supra*.

CONCLUSION

The Indian Preference statutes declared invalid by the court below do not conflict with the provisions of the Equal Employment Opportunity Act, are consistent with the long-standing congressional policy of promoting Indian self-government, and are essential to make the Bureau of Indian Affairs more responsive to the needs and desires of the society it serves. **For the foregoing reasons, the judgment of the district court should be reversed.**

Respectfully submitted,

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ROGERS C. B. MORTON, Secretary of the Interior, *et al.*,

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—and—

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—v.—

C. R. MANCARI, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BRIEF FOR INTERVENOR-APPELLANT AMERIND

Opinion Below

The opinion of the District Court is reported at 359 F. Supp. 585 (D.N.M. 1973).[1]

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[1] A copy of the opinion may be found in Appendix B of Amerind's Jurisdictional Statement (hereinafter "JSA"). Citations to "App." refer to the Appendix prepared in No. 73-362, with which this appeal has been consolidated.

Jurisdiction

The District Court entered judgment on June 1, 1973. On June 29, 1973, the Government and Intervenor-Defendant Amerind filed notices of appeal. This Court noted probable jurisdiction in the Government's appeal on January 14, 1974, and in Amerind's appeal on February 22, 1974. On the latter date, it ordered that the two appeals be consolidated.

Statutes Involved

The Indian Preference Statute of 1934, 25 U.S.C. § 472 (1970), provides as follows:

> "The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions."

Earlier legislation providing preference for Indian employees in the Federal Indian agency include 25 U.S.C. §§ 44, 45 and 46 (1970).

Section 717(a) of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16(a) (Supp. II, 1972), provides as follows:

> "All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in Section 102 of Title 5 [United States Code], in executive agencies (other than

the General Accounting Office) as defined in Section 105 of Title 5 [United States Code] (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin."

Questions Presented

1. Whether the District Court erred in holding that by passing the Equal Employment Opportunity Act of 1972, which imposed a general prohibition on discrimination in employment in the Federal Government, Congress had impliedly repealed its Indian Preference legislation, including a statute passed nearly forty years earlier which specifically gave preference to qualified Indians in appointment to vacancies in the Bureau of Indian Affairs.

2. Whether the Indian Preference legislation, in particular 25 U.S.C. § 472, which was designed to give members of Indian Tribes a measure of self-government, violates the Fifth Amendment to the United States Constitution.

Statement of the Case

1. *The Bureau of Indian Affairs and Indian Preference*

The American Tribal Indian occupies a unique position in the constitutional framework of the United States. Specifically recognized by the Constitution,[2] the Indian Tribes

[2] U.S. Const. art. I, § 2, cl. 3; art. I, § 8, cl. 3; amend. XIV, § 2.

are considered domestic dependent nations.[3] Congress has subjected them to an entire body of laws applicable to them alone. *See* Title 25, U.S.C. (1970). For example, the Tribes are permitted to establish their own systems of criminal and civil courts and to establish official religions. *See* p. 24 *infra*.

The Bureau of Indian Affairs[4] is likewise unique, since it is the only agency of the Federal Government which governs the lives of one distinct class of people.[5] It controls almost all aspects of Indian reservation life, and its jurisdiction extends to the Indians' land, education, employment, health, welfare, economic and industrial assistance, and general support. However, it should be noted that the Bureau supervises only members of federally-recognized Tribes, not all Indians.[6]

On a number of separate occasions between 1834 and 1894, Congress passed laws designed to promote the staffing of the Indian agency by Indians. *See,* for example, 25 U.S.C. §§ 44, 45 and 46 (1970). However, as the legislative history of the 1934 Statute, 25 U.S.C. § 472, makes clear, the

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[3] *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164, 167 (1973); *Baker* v. *Carr*, 369 U.S. 186, 215 (1962).

[4] The Federal Indian services consist of the Bureau of Indian Affairs, which is part of the United States Department of the Interior, and the Indian Health Service, which is part of the United States Department of Health, Education, and Welfare. The Indian Health Service regards itself as subject to the Indian Preference Statutes. However, the Bureau of Indian Affairs is the more important of the two agencies and the only agency directly involved in this case. Therefore, this Brief refers primarily to the Bureau, although many of the arguments would also apply to the Indian Health Service.

[5] The only agency remotely resembling the Bureau is the Office of Territorial Affairs in the Department of the Interior.

[6] Many Tribes have terminated their relationship with the Federal Government.

Government failed to put these Congressional directives into effect, with the result that by 1934 the Indian Office (as it was then called) employed proportionately fewer Indians than in 1900.[7] Thus, Senator Norbeck stated during the hearings on the bill that became the Indian Reorganization Act of 1934:

> "I think we have utterly fallen down in the present system. The Indian has been excluded. The reservation has been filled up with white people who live off the Indians." *Senate Hearings*, pt. 2 at 259.

Congress accordingly passed Section 472 of the 1934 Act, which expressly permits Indians to be appointed to the "Indian Office" without regard to civil service laws, and provides that ". . . qualified Indians shall hereafter have the preference to appointment to vacancies" in that agency.

The predominant purpose of Section 472, as manifested in the extensive legislative history, was to provide the Indians with a measure of self-government.[8] The legislators repeatedly emphasized that the aim of the provision was to give Indians the opportunity to run the Government agency controlling Indian affairs, and that this agency was

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[7] Memorandum on S. 2755 submitted to the Senate Committee by the Bureau of Indian Affairs by John Collier, Commissioner for Indian Affairs, reprinted in *Hearings on S. 2755 and S. 3645 before Senate Committee on Indian Affairs*, 73d Cong., 2d Sess., pt. 1 at 19 (1934) (hereinafter "*Senate Hearings*").

[8] The United States Court of Appeals for the Tenth Circuit recently stated, in a case ruling that Section 472 did not apply to reductions-in-force, that:

> "[Section 472] was intended to integrate the Indian into the government service connected with the administration of his affairs. Congress was anxious to promote economic and political self-determination for the Indian." *Mescalero Apache Tribe* v. *Hickel*, 432 F.2d 956, 960 (10th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971).

unique in the Federal Government. During the hearings on the bill, Senator Wheeler, Chairman of the Senate Committee on Indian Affairs and one of the sponsors of the bill, stressed that:

> "[The Indian Office] is an entirely different service from anything else in the United States because these Indians own this property. It belongs to them. What the policy of this government is and what it should be is to teach these Indians to manage their own business and control their own funds and to administer their own property. . . ." *Senate Hearings* 256.

During the debate, Senator Wheeler declared that the bill "seeks to impose upon the Indians self government in their own affairs," 78 Cong. Rec. 11123 (1934). And in the House debate, Representative Howard, the other sponsor of the bill, said:

> "The Indians have not only been thus deprived of civic rights and power, but they have been largely deprived of the opportunity to enter the more important positions in the service of the very bureau which manages their affairs." 78 Cong. Rec. 11729 (1934).

2. *The Freeman Case*

The present suit arises from the efforts of Indians to obtain full compliance by the Federal Government with the 1934 Statute. For 38 years after the passage of the Act the Government refused to apply Indian Preference to promotions and lateral job reassignments within the Bureau of Indian Affairs, and instead restricted it to situations where qualified Indian and non-Indian applicants were competing from outside the Bureau for a position in the Bureau.* Indian employees of the Bureau consequently

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* Prior to 1966, the Bureau did not even apply Indian Preference to such limited appointments in a consistent fashion. Testimony of Raymond Gunter, App. 181.

made little headway. The United States Court of Appeals for the Tenth Circuit observed that:

> "As the non-Indian employees retired or moved on to other jobs, competent Indians were expected to have taken their place. Unfortunately, this has apparently not happened, especially in the policy-making positions." *Mescalero Apache Tribe* v. *Hickel, supra,* 432 F.2d at 960.

Testimony in this case indicated that in May, 1972, 57 percent of the 16,500 employees of the Bureau were Indian. However, 76 percent of the employees at GS-7 and below were Indian, while only 21 percent of the employees at GS-9 and above were Indian.[10]

On February 5, 1971, four Indian employees of the Bureau brought suit in the United States District Court for the District of Columbia against the Secretary of the Interior and certain officials of the Bureau challenging the narrow interpretation of the Indian Preference Statutes then in operation, and arguing that Indian Preference should be extended to the areas of promotion, reassignment and training. A new Preference Policy, under which Indian Preference would be extended to promotions and reinstatements, was announced in 1972, while the suit was in progress. However, the suit proceeded on the issues whether Indian Preference extended to training, lateral transfers and reassignments, and whether exceptions to Indian Preference could be granted.

On December 21, 1972, the District Court (Corcoran, J.) entered summary judgment in favor of plaintiffs,[11] and

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[10] *Id.*, App. 191.

[11] Except on the training issue, which the court resolved in favor of defendants.

held that 25 U.S.C. § 472 required that Indian Preference be applied to "all initial hirings, promotions, lateral transfers and reassignments" in the Bureau, and that no exceptions could be granted. *Freeman* v. *Morton*, Civ. No. 327-71 (D.D.C. Dec. 21, 1972),[12] JSA, App. D at 46-47.

Although the constitutionality of the Indian Preference Statutes was not at issue in *Freeman*, the District Court noted in dictum that not all classifications based on race are invalid. It also commented that the Indian Preference Statutes appeared to be a rational exercise of Congress' broad powers to "... do all that [is] required ... to prepare the Indians to take their place as independent, qualified members of the modern body politic," citing *Board of County Commissioners* v. *Seber*, 318 U.S. 705, 715 (1943).[13]

3. *The Proceeding Below*

Following the announcement in June, 1972, of the new Indian Preference Policy, plaintiffs in this case, four non-Indian employees of the Bureau in Albuquerque, New Mexico, brought this action in the United States District Court for the District of New Mexico seeking to enjoin defendants from enforcing the new policy. Plaintiffs attacked the Indian Preference Statutes on two grounds: first, that they deprived plaintiffs of their right to property without due process of law, thereby contravening the Fifth Amendment to the United States Constitution; and second, that they were in direct conflict with the rights of

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[12] The Government has appealed the decision to the extent that it applies Indian Preference to lateral transfers and that it denies authority to grant exceptions. Oral argument was heard by the United States Court of Appeals for the District of Columbia Circuit on February 21, 1974. No decision had been handed down as of the date of this Brief.

[13] JSA, App. D at 41 n. 3.

non-Indian employees of the Bureau protected under Section 717(a) of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16(a).

Upon motion of plaintiffs, a three-judge court was convened to hear the case, since plaintiffs sought to enjoin the enforcement of Federal statutes, in part upon the ground that they were repugnant to the United States Constitution. The District Court held that the case could proceed as a class action. On November 20, 1972, it entered an order permitting Amerind to intervene in the case as a party defendant.

On June 1, 1973, following a hearing on the merits, the District Court entered judgment in favor of plaintiffs. Despite the fact that the Indian Preference Statutes are special legislation, applicable only to two small Indian agencies, the court held that they had been impliedly repealed by the Equal Employment Opportunity Act of 1972, a law applying to the Federal Government generally. Extensive legislative history of the 1934 Act had been placed before the court in order to demonstrate that the primary intent of Congress in passing that statute was to promote self-determination for the Indian Tribes. In addition, Raymond Gunter, Personnel Officer for the Bureau, testified that the new Preference Policy announced in 1972 would considerably increase the rate at which Indians would advance into the higher levels of the Bureau, thus demonstrating how Indian Preference, fully applied, would further the Congressional purpose of an Indian-run Bureau of Indian Affairs. App. 192, 195.[14] Apparently ignoring

[14] Mr. Gunter also testified that, had the new policy been implemented earlier, there would have been a much greater number of Indian employees at all levels in the Bureau, including the higher-level positions. App. 199.

the record before it, the District Court stated that no evidence had been introduced to show any "national-public purpose concerned in the Preference Policy as compared with the nondiscrimination statutes." 359 F. Supp. at 591, JSA, App. B at 34.

The court did not reach the question of the constitutionality of the Indian Preference Statutes. However, it stated that in the absence of evidence to indicate that an important governmental objective lay behind the statutes, "we could well hold that the statute must fail on constitutional grounds." 359 F. Supp. at 591, JSA, App. B at 35. The court apparently believed that Indian Preference was a purely racial classification, since it assumed that Indian Preference applied to "all Indians as individuals," (359 F. Supp. at 588, JSA, App. B at 30), despite clear evidence of record to the contrary.[15] No mention was made of the extensive legislative history of the 1934 Statute, introduced by defendants, which clearly demonstrated that the primary purpose of that statute was to help federally-recognized Tribes towards self-government.

The Government and Amerind both filed Notices of Appeal with this Court on June 29, 1973. On August 16, 1973, upon application by the Government, the Court (Marshall, J.), stayed the enforcement of the District Court's judgment pending disposition of the appeal.

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[15] Only members of federally-recognized Tribes are eligible for Indian Preference. App. 92, 200.

Summary of Argument

1. Congressional approval of Indian Preference in the basic civil rights legislation and in a statute passed subsequent to the 1972 Equal Employment Opportunity Act demonstrates that in passing the latter statute Congress did not intend to repeal the 1934 Indian Preference Statute. Moreover, under well-established principles of statutory construction, general legislation, such as the 1972 Act, does not impliedly repeal earlier special legislation.

2. In passing the 1934 Indian Preference Statute, Congress was using its uniquely broad powers to legislate for the benefit of Indian Tribes. These powers are derived from the unique constitutional position of these "domestic dependent nations." There was, and still is, a valid governmental purpose behind the statute—to give Indian Tribes a measure of self-government—which was more than ample to override any possible constitutional objections. Furthermore, the 1934 Statute does not result in a purely racial classification, since not all Indians are eligible for Indian Preference.

ARGUMENT

I.

In Passing the Equal Employment Opportunity Act of 1972 Congress Did Not Intend to Repeal the Indian Preference Statutes.

It is a cardinal principle of this Court that, when two acts of Congress appear to be in conflict, the Court will give effect to both if that result is possible.[16] Repeals by implication are disfavored;[17] and the intention of Congress to repeal an earlier act by subsequent legislation "must be clear and manifest."[18]

The Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e, *et seq.*, did not by its own terms expressly repeal the Indian Preference Statutes; nor is there a single word in the legislative history of that statute to suggest that Congress intended such a repeal. To the contrary, other congressional actions taken before and after passage of the 1972 Act make it almost inconceivable that Congress could have intended to sweep away sub silentio the special laws which it has developed over the past 140 years to promote Indian self-determination. Moreover, the principles of statutory construction simply do not permit a broad statute applicable to virtually the entire Federal Government to repeal by implication an earlier special statute re-

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[16] *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939); *Gen. Motors Acceptance Corp.* v. *United States*, 286 U.S. 49, 61-62 (1932).

[17] *Universal Interpretive Shuttle Corp.* v. *Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186, 193 (1968); *Amell* v. *United States*, 384 U.S. 158, 165-66 (1956).

[18] *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939); *Red Rock* v. *Henry*, 106 U.S. 596, 601-02 (1882).

lating solely to Indian employees of two small Government agencies.

A. *The Indian Preference Statutes and the Equal Employment Opportunity Act Have Different Purposes and Are Not Mutually Exclusive.*

The primary purpose of the Indian Preference Statutes was to provide Tribal Indians with a method for governing themselves.[19] The statutes were not intended to ensure the Indians equal employment opportunities; nor are they "affirmative action" programs in disguise. Indian Preference extends only to the Indian Health Service and the Bureau of Indian Affairs; and the preference is available only to Federally-recognized Tribal members, and not to all Indians. App. 200. Indians receive no preference of any sort from other Federal agencies. The Bureau of Indian Affairs is unique among Federal agencies, because it is the only agency of the United States which is responsible for governing the affairs of one distinct group of people within our borders.[20]

The Indian Preference Statutes reflect a decision by Congress that its responsibilities to the Indian Tribes will be carried out best if Indians administer their own affairs, a policy that fully accords with the concept of the Indian Tribes as domestic dependent nations.[21] Like the Tribes' unique privilege of establishing their own courts and crimi-

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[19] *See* p. 29 *infra*.

[20] Senator Wheeler, one of the sponsors of the Indian Preference Statute of 1934, stated that the Bureau "is an entirely different service from anything else in the United States. . . ." *Senate Hearings* 256.

[21] *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164, 168 (1973); *Baker* v. *Carr*, 369 U.S. 186, 215 (1962).

nal codes,[22] the Indian Preference Statutes provide a measure of self-regulation which is really a variety of home rule.[23]

The Indian Preference Statutes and the Equal Employment Opportunity Act are not mutually exclusive. They might appear to be irreconcilable if one ignores this Court's settled rule that the policy and spirit, as well as the letter, of the statutes are important factors when considering repeal by implication.[24] The goal of the Indian Preference Statutes, self-determination by the Tribes of their own affairs as domestic dependent nations, is sui generis. Neither the Indian Preference legislation nor the Bureau of Indian Affairs has a counterpart elsewhere in the civil service. Even the appellees admit that "Indians have had a different and perhaps unique status and relation to the United States."[25]

The thorough analysis of the history of Indian Preference policies contained in the Government Brief shows how Congress has provided for such Preference from 1834 to the present day. It is highly improbable that Congress, in passing legislation to prevent discrimination by the Federal Government against minority groups, intended to repeal time-honored legislation designed to assist the members of one such group towards self-determination.

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[22] *Williams* v. *Lee*, 358 U.S. 217 (1959); *United States* v. *Quiver*, 241 U.S. 602 (1916); *Ex parte Crow Dog*, 109 U.S. 556 (1883).

[23] *See* M. Price, *Law and the American Indian* 8-9 (1973).

[24] *Eastern Extension, Australasia & China Tel. Co.* v. *United States*, 231 U.S. 326, 333 (1913).

[25] Motion To Dispense with Printing of Motion, To Dismiss Appeal, and To Affirm the Decision of the Lower Court at 8.

B. *The Legislative History of the Civil Rights Legislation Demonstrates Congressional Approval of Indian Preference.*

The Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, which, *inter alia*, prohibited discrimination by private employers because of race, expressly exempted Indian Preference programs. Section 703(i), 42 U.S.C. § 2000e-2(i), provides that the prohibition does not apply to

> "any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice . . . under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation."

Senator Humphrey, who sponsored this provision, observed that:

> "This exemption is consistent with the *Federal Government's policy of encouraging Indian employment* and with the special legal position of Indians." 110 Cong. Rec. 12721 (1964) (emphasis supplied).[26]

Thus, in 1964, Congress reaffirmed its faith in the wisdom and necessity of Indian Preference by expressly exempting private employers who adopted Indian Preference programs from the general sanctions of the 1964 Civil Rights Act.

The 1972 Equal Employment Opportunity Act, which the lower court held had impliedly repealed the Indian Preference Statutes, was an amendment to the 1964 Act designed primarily to strengthen the enforcement powers of the Equal Employment Opportunity Commission. Sec-

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[26] Senator Mundt also supported the provision, declaring that it would enable Indians "to benefit from Indian preference programs now in operation or later to be instituted." 110 Cong. Rec. 13702 (1964).

tion 717(a), which was added in committee, essentially codified existing constitutional requirements and Executive Orders barring discrimination in the Federal Government,[27] and gave Federal employees increased enforcement rights. In amending the 1964 Act, Congress neither altered nor repealed Section 2000e-2(i), which, even now, allows private employers to augment the Federal Government's Indian Preference programs. It is inconceivable, in these circumstances, that Congress could have intended the 1972 Act to repeal sub silentio the Federal Government's own Indian Preference programs, while continuing to permit Indian Preference in private employment.

This conclusion is fortified by the fact that *after* passing the Equal Employment Opportunity Act of 1972, Congress enacted additional Indian Preference laws: 20 U.S.C. § 887c (a) and (d), and 20 U.S.C. § 1119a (Supp. 1973). These provisions, which are part of the Education Amendments Act of 1972, Pub.L. No. 92-318, require that in programs for the training of teachers for Indian children, "preference shall be given to the training of Indians."[28] It is hard to believe that, if Congress had intended to sweep away Indian Preference in the Bureau of Indian Affairs as being in conflict with the goals of the Civil Rights legislation, it would specifically have imposed an Indian Preference policy in government-funded programs a few months later.

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[27] *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); Executive Orders 11246, 3 C.F.R. 172 (1973), and 11478, 3 C.F.R. 214 (1973). Section 701(b) of the 1964 Act itself stated that it was "the policy of the United States to insure equal employment opportunities for Federal employees. . . ." 78 Stat. 254. *See also* 118 Cong. Rec. S. 2279 (daily ed., Feb. 22, 1972) (remarks of Senator Cranston).

[28] The preference provision was added in conference. *See U.S. Code Congressional and Administrative News*, vol. 2, 1773, 2659, 92d Cong., 2d Sess. (1972).

C. ***Repeal of the Indian Preference Statutes Would Eliminate the "Excepted Service" Through Which the Majority of Indians Enter the BIA: Congress Could Not Have Intended Such a Result.***

The first sentence of the 1934 Preference Statute, 25 U.S.C. § 472, authorizes the appointment of Indians to the Bureau "without regard to civil-service laws." This has given rise to the so-called "Excepted Service" within the Bureau, whereby Indians are exempted from taking civil service examinations or meeting civil service requirements in qualifying for initial appointment to the Bureau of Indian Affairs.[29]

As a result of this exemption from initial civil service requirements, large numbers of Indians work in the BIA who otherwise might not have been hired.[30] Testimony before the lower court indicated that at least half the Bureau's present Indian staff belongs to the Excepted Service (App. 194); and it is believed that most Indians joining the Bureau do so by this route.

Plainly, if Congress had intended to repeal that part of Section 472 giving Preference to qualified Indians, it must also have meant to eliminate the Excepted Service

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[29] 5 C.F.R. § 213.3112(a)(7) (1973). An Indian who desires to transfer to another Federal agency must take civil service examinations and pass all civil service requirements like any other Federal employee; *see* App. 197.

[30] The legislative history of the Statute makes clear the reasons for establishing the Excepted Service:

"At the present time, by reason of the civil-service rules and regulations, we find that competent Indians are absolutely unable to take or hold positions in the Indian Service." 78 Cong. Rec. 11123 (1934) (remarks of Senator Wheeler).

"I do not think that the broad horizontal civil-service requirements fit; I do not think they are of the type to meet the peculiar requirements of the Indian Service generally." *Hearings on H.R. 7902 before House Committee on Indian Affairs*, 73d Cong., 2d Sess. at 39 (1934) (Commissioner Collier).

provision, which is an integral part of the section. In that event, Indians wishing to serve in the Bureau of Indian Affairs would be subject to normal civil service regulations, and doubtless far fewer would be hired. Such a result would be exactly the opposite of the result intended by Congress in passing the 1934 Statute: to gradually turn the Indian agency over to the Indians. It would also be directly contrary to the current policy of the Federal Government, which was well expressed in a 1970 Presidential Message to Congress:

> "The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions." H.R. Doc. No. 91-363, 91st Cong., 2d Sess., 116 Cong. Rec. 23132 (1970).

It would be a travesty to hold that the 1972 Act, which was aimed at providing "Federal jobs and real advancement opportunities for minority groups in Federal service,"[21] had sub silentio eliminated the most important means by which the members of a severely deprived minority group are enabled to serve their own people in the Federal Government.[22]

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[21] 118 Cong. Rec. S. 2287 (daily ed., Feb. 22, 1972) (remarks of Senator Cranston).

[22] Congress may very well not have intended the 1972 Act to apply to the Excepted Service generally. Section 717(a), 42 U.S.C. § 2000e-16, covers not only Federal military departments and executive agencies, but also "those units of the Government of the District of Columbia *having positions in the competitive service*, and . . . those units of the legislative and judicial branches of the Federal Government *having positions in the competitive service*." (emphasis supplied). In its section-by-section analysis of the bill, the House Report states with reference to Section 717(a):

> "All personnel actions affecting employees or applicants for employment *in the competitive service of the United States* . . . shall be made free from any discrimination based on

D. *In the Absence of Legislative Intent to the Contrary, General Legislation Does Not Repeal Earlier Special Legislation.*

Even if the District Court had been justified in disregarding the express intentions of Congress concerning Indian Preference, it clearly erred in holding that the Indian Preference Statutes were impliedly repealed by the Equal Employment Opportunity Act of 1972. "The cardinal rule is that repeals by implication are not favored."[33] It is a universally recognized rule of statutory construction that when one statute applies only to a specific factual situation, it will control another statute applying to a general situation, regardless of the priority of enactment.[34] This Court has emphasized that, when two statutes are applicable, both should be given effect, and that a partial overlap of the statutes does not repeal, *pro tanto*, the provisions of

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race, color, religion, sex or national origin." H.R. Rep. No. 92-238, 92d Cong., 2d Sess. at 32 (1972), *U.S. Code Congressional and Administrative News*, vol. 2, 2137, 2167 (1972) (emphasis supplied). *See also* S. Rep. No. 92-415, 92d Cong., 1st Sess., at 45 (1971).

A section-by-section analysis introduced by Senator Williams, one of the sponsors of the Act, states:

"All employees of any agency, department, office or commission having positions *in the competitive service* are covered by this section." 118 Cong. Rec. S. 2301 (daily ed., Feb. 22, 1972) (emphasis supplied).

Even though the Act by its terms applies to all employees of the Executive agencies, this legislative history suggests that Congress may have had only the Competitive Service in mind, and meant to exempt the Excepted Service at the Bureau, and elsewhere in the Federal Government, from Section 717(a).

[33] *Posadas* v. *Nat'l City Bank*, 296 U.S. 497, 503 (1936); *accord*, *Jones* v. *Mayer Co.*, 392 U.S. 409, 437 (1968).

[34] *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758 (1961). *See also Squire* v. *Capoeman*, 351 U.S. 1, 10 (1956), and *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930), both cases involving Indians. One reason for this rule is that Congress on occasion overlooks the possible effect of its actions on prior legislation. *See Wilderness Society* v. *Morton*, 479 F.2d 842, 881 (D.C. Cir. 1973) (*en banc*).

the earlier statute.[35] Furthermore, statutes and treaties involving Indians should be construed "in a spirit which generously recognizes the full obligations of this nation to protect the interests of a dependent people."[36] In a similar context, also involving a guardianship relationship, this Court recently observed "what Congress has plainly granted we hesitate to deny." *U.S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U.S. 351, 357 (1971).

The District Court's conclusion that this case does not involve the relationship of a general statute to a special statute[37] is inexplicable. The 1972 Equal Employment Opportunity Act applies to virtually the entire Federal Government, while the Indian Preference Statutes cover only two small agencies.[38] In the context of government operations, a special statute is one which applies to certain designated agencies but does not affect the operations of other agencies governed by broader statutory provisions.[39] There can be no doubt that the Indian Preference Statutes constitute special legislation, and that the Equal Employment Opportunity Act is general legislation within the meaning of the rule. The District Court's determination therefore cannot stand.

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[35] *See United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939).

[36] *Tulee* v. *Washington*, 315 U.S. 681, 684-85 (1942). This Court has frequently likened the relationship between the Indians and the United States to that between a ward and his guardian. *See, e.g., Baker* v. *Carr*, 369 U.S. 186, 215 (1962).

[37] JSA, App. B at 33.

[38] *See* n. 4 *supra*.

[39] *See Myers* v. *Hollister*, 226 F.2d 346, 349 (D.C. Cir. 1955); *cert. denied*, 350 U.S. 987 (1956); *cf. Panama Canal Co.* v. *Anderson*, 321 F.2d 98 (5th Cir. 1963), *cert. denied*, 375 U.S. 832 (1963).

II.

The Indian Preference Statutes Are Constitutional Because They Are a Reasonable Exercise of the Uniquely Broad Power of Congress to Enact Special Legislation Promoting Self-Government by Indian Tribes.

Although the District Court did not resolve the constitutional issue, it suggested that it could have held that the Indian Preference Statutes violate the Due Process Clause of the Fifth Amendment because they do not further a "reasonable governmental purpose." [40] If this Court decides that the Indian Preference Statutes have not been repealed by implication, then it may wish to consider the constitutional issue. We submit that there was more than enough evidence in the record below to demonstrate that the Indian Preference Statutes are constitutional, as a reasonable exercise of Congress' broad power to enact legislation to protect Indian Tribes, and to assist them towards the goal of self-government.

A. *The Indian Tribes and the Power of Congress to Govern Them Are Unique.*

1. The Constitution Grants Congress Plenary Power to Regulate Indian Affairs.

The broad power of Congress over Tribal affairs, and the corresponding rights to which Indians are entitled, rest upon constitutional provisions which apply to Indians alone. Congress has plenary power over the Indian Tribes,[41] which emanates from three enumerated powers in the Con-

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[40] JSA, App. B at 35.

[41] *See Bd. of County Comm'rs* v. *Seber*, 318 U.S. 705, 716 (1943); *United States* v. *Kagama*, 118 U.S. 375, 384 (1886).

stitution: the power to declare war,[42] the power to make treaties,[43] and the power to regulate commerce with the Indian Tribes.[44] The power of Congress to regulate commerce with the Indian Tribes is "exceedingly broad"; it "gained breadth by reason of historic experiences that induced Congress to treat Indians as wards of the Nation."[45] Together, these powers comprehend all that is required for the regulation of the relationships between the United States and Indian Tribes.[46]

This Court has repeatedly upheld the power of Congress to enact special legislation for the protection and benefit of the Indians.[47] The power of Congress to enact laws to protect and benefit Indians remains, even though Indians have been granted citizenship.[48]

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[42] U.S. Const. art. I, § 8, cl. 9.

[43] U.S. Const. art. II, § 2, cl. 2; *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164, 172 n. 7 (1973); *Ex parte Crow Dog*, 109 U.S. 556, 561-66 (1883).

[44] U.S. Const. art. I, § 8, cl. 3; *see Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 159 (1973) (Douglas, Brennan & Stewart, JJ., concurring and dissenting in part).

[45] *Mescalero Apache Tribe* v. *Jones*, *supra*, 411 U.S. 145, 159.

[46] *Worcester* v. *Georgia*, 31 U.S. 350, 379, 6 Pet. 515, 560 (1832) (Marshall, C.J.).

[47] *See, e.g., Bd. of Comm'rs* v. *United States*, 308 U.S. 343 (1939); *United States* v. *McGowan*, 302 U.S. 535 (1937).

[48] *United States* v. *Nice*, 241 U.S. 591, 598 (1916) ("Citizenship is not incompatible with continued Tribal existence or continued guardianship, and so may be conferred without . . . placing [Indians] beyond the reach of Congressional regulations adopted for their protection.") *See also Bd. of County Comm'rs* v. *Seber*, 318 U.S. 705, 718 (1943); *United States* v. *Sandoval*, 231 U.S. 28, 48 (1913); *New Mexico ex rel. State Highway Comm'n* v. *United States*, 148 F. Supp. 508, 511 (D.N.M. 1957).

Although Congress' power over Indian affairs is not completely unfettered,[49] "Congress is invested with a wide discretion and its actions, unless purely arbitrary, must be accepted and given full effect by the Courts."[50]

Congress' discretion in regulating Tribal affairs is unusually broad because there are no constitutional restraints analogous to those which limit Congressional power over the states and over individual citizens.[51] Furthermore, the Constitution does not restrain Indian Tribes to the same extent that it limits the power of the states and the Federal Government.[52] This Court has declared that "Congress alone has the right to determine the manner in which this country's guardianship over the Indians will be carried out. . . ."[53]

The District Court ignored the unique constitutional provisions which grant Congress a singularly broad power to regulate Tribal affairs as it deems best. Congress' decision that the agency responsible for governing the Tribes should be staffed with Tribal members was well within its discretion because, as subsequent discussion makes clear, the Indian Preference Statutes are a reasonable method of providing a means of self-government to the Tribes, which still possess a residual, inherent sovereignty.[54]

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[49] *See Perrin* v. *United States*, 232 U.S. 478, 486 (1914); *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913).

[50] *Perrin* v. *United States*, 232 U.S. 478, 486 (1914).

[51] *See, e.g.*, U.S. Const. amends. I-X. *See generally* Comment, *The Indian Battle for Self-Determination*, 58 Cal. L. Rev. 445, 451 (1970).

[52] *Native Am. Church* v. *Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959); *see Talton* v. *Mayes*, 163 U.S. 376 (1896).

[53] *United States* v. *McGowan*, 302 U.S. 535, 538 (1938).

[54] *See Worcester* v. *Georgia*, 31 U.S. 350, 6 Pet. 515 (1832); *Native Am. Church* v. *Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959).

2. The Indian Tribes Are Unique Constitutional Entities.

The legal status of Tribal Indians is sui generis. Unlike the members of every other ethnic minority, they constitute distinct, political communities, whose anomalous and complex relationship to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.[55]

This Court has long recognized the Indian Tribes as separate political entities which possess some degree of sovereignty.[56] As recently as last year the Court reaffirmed its time-honored doctrine that the Indian Tribes are separate, albeit dependent nations.[57] It has been said that "Indian tribes are not states. They have a status higher than states."[58]

The decisions of this Court reflect the unique status of Indian Tribes. In the absence of Federal legislation, the Tribes may establish their own courts and penal codes,[59] and may levy taxes.[60] No other ethnic minority in the Union has such rights. Even now, the Tribes may recog-

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[55] *Baker* v. *Carr*, 369 U.S. 186, 215 (1962); *United States* v. *Kagama*, 118 U.S. 375, 378-79 (1886); *Worcester* v. *Georgia*, 31 U.S. 350, 368, 6 Pet. 515, 542-43 (1832) (Marshall, C.J.); *see Cherokee Nation* v. *Georgia*, 30 U.S. 1, 5 Pet. 1, 16, 17 (1831).

[56] *Colliflower* v. *Garland*, 342 F.2d 369, 374 (9th Cir. 1965); *see, e.g., Worcester* v. *Georgia*, 31 U.S. 350, 6 Pet. 515 (1832).

[57] *See McClanahan* v. *State Tax Comm'n*, 411 U.S. 164, 168 (1973).

[58] *Native Am. Church* v. *Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959).

[59] *Williams* v. *Lee*, 358 U.S. 217 (1959).

[60] *Barta* v. *Oglala Sioux Tribe*, 259 F.2d 553, 556 (8th Cir. 1958), *cert. denied* 358 U.S. 932 (1959); *see Buster* v. *Wright*, 203 U.S. 599 (1906), *dismissing appeal from* 135 F. 947, 950-52 (1905). *See generally* R. Bennett & F. Hart, *Felix S. Cohen's Handbook of Indian Law* 142 (1942 ed.; Univ. N.M. reprint 1971).

nize and support an official religion, a power denied the states and the Federal Government.[41] There are numerous other examples of the singular legal status of the Indian Tribes.[42]

The Indians have a unique legal status because they comprise a nation which claimed and received the protection of a more powerful nation, the United States, but did not abandon their national character in gaining their protection.[43] Congress' unusual powers over the Indians, and the Court's recognition of their unique place in American law, exist not because Indians belong to a different race, but because they owe allegiance to the Tribes.[44]

The peculiar status of the Indian nations or Tribes was well summarized in a passage from the leading work on

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[41] *Compare* U.S. Const. amend. I *with* 25 U.S.C. § 1302(1) (1970); *see Engel* v. *Vitale*, 370 U.S. 421 (1962); *Zorach* v. *Clauson*, 343 U.S. 306 (1952). Until 1968, when Congress, exercising its plenary power over the Tribes, enacted an "Indian Bill of Rights" as part of the Civil Rights Act, 25 U.S.C. §§ 1301-03 (1970), the Indians were generally immune from the restrictions of the Bill of Rights. *Talton* v. *Mayes*, 163 U.S. 376 (1896); *Native Am. Church* v. *Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959).

[42] *See generally* R. Bennett & F. Hart, *Felix S. Cohen's Handbook of Indian Law* 89-236, 268-347, 358-82 (1942 ed.; Univ. N.M. reprint 1971). The unique position of the Indians is highlighted by an equally unique canon of statutory construction developed by this Court that doubtful expressions and ambiguities in legislation are to be construed in favor of Indians whenever their rights are at stake. *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164, 174, 176 (1973); *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956).

[43] *Worcester* v. *Georgia*, 31 U.S. 350, 376, 6 Pet. 515, 555 (1832).

[44] "The events which led to the decisions, including treaties and physical conquests, have no parallel in the background of non-Indian groups. . . ." Vieira, *Racial Imbalance, Black Separatism and Permissible Classification by Race*, 67 Mich. L. Rev. 1553, 1577-81 (1969), reprinted in M. Price, *Law and the American Indian* 93, 97 (1973).

Indian law (F. Cohen, *Handbook of Federal Indian Law*, quoted with approval by the United States Court of Appeals for the Tenth Circuit in *Native American Church* v. *Navajo Tribal Council, supra*, 272 F.2d at 133-34):

> " 'The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.' " *See also, e.g., Groundhog* v. *Keeler*, 442 F.2d 674, 678 (10th Cir. 1971).

The term "Indian," as the Constitution, Congress, and this Court have always used it, is primarily a *political* designation rather than a purely racial classification.[45] The relevant constitutional provisions refer not to Indians as a race, but to Indian *Tribes* and Indians *not taxed*.[46] In particular, the constitutional provision sanctioning treaties

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[45] *See* Cohen, *Indian Rights and the Federal Courts*, 24 Minn. L. Rev. 144, 186 n. 128 (1940).

[46] U.S. Const. art. I, § 8, cl. 3; art. I, § 2, cl. 3; amend. XIV, § 2. Indians, of course, have always been able to remove themselves from the Constitution's designation, and from Congress' special treatment, by severing their ties with a Tribe. *Cf. Elk* v. *Wilkins*, 112 U.S. 94, 102 (1884).

with the Indians, "admits their rank among those powers who are capable of making treaties." [87]

The District Court erred in treating this as a "reverse discrimination" case. *See* JSA, App. B at 33. It is not. The Indian Preference Statutes apply only to members of Federally-recognized Tribes. App. 200. Non-Tribal Indians and members of terminated Tribes do not receive any preference. Furthermore, even Tribal members do not receive a preference in Federal employment generally, but only in the special Bureau which governs the Tribes.

3. The Bureau of Indian Affairs Is as Unique as the Indian Tribes It Governs.

The Bureau of Indian Affairs has no counterpart elsewhere in the Federal Government. App. 196.[88] Dealing exclusively with the members of the domestic dependent nations within our borders, the Bureau possesses almost absolute control over their lives: from birth until death, Indians' homes, land, education, employment, health, welfare, economic and industrial assistance, general support, and "civilization" come under the jurisdiction of the Bureau.[89]

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[87] *Worcester* v. *Georgia*, 31 U.S. 350, 379, 6 Pet. 515, 559-60 (1832) (Marshall, C.J.). Although treaty-making was abandoned by the Act of March 3, 1871, 16 Stat. 544, 556 (1871), the treaties previously entered into remain in force, and still provide a fertile source of litigation. *See, e.g., Menominee Tribe* v. *United States*, 391 U.S. 404 (1968), *aff'g* 388 F.2d 998 (Ct. Cl. 1967); *Leech Lake Band of the Chippewa Indians* v. *Herbst*, 334 F. Supp. 1001 (D. Minn. 1971).

[88] The uniqueness of the Bureau prompted Senator Wheeler, co-sponsor of the 1934 Indian Reorganization Act, to state that the Bureau "is an entirely different service from anything else in the United States because these Indians own this property." *Senate Hearings* 256.

[89] Note, *The Indian: The Forgotten American*, 81 Harv. L. Rev. 1818, 1819-20 (1968).

Almost all of the Bureau's programs deal with reservation Indians and therefore with lands and property owned by Indians. App. 196.[70] However, so pervasive is the Bureau's control that one observer has concluded that:

> "Although the normal expectation in American society is that a private individual may do anything unless it is specifically prohibited by the government, it might be said that the normal expectation on the reservation is that the Indians may not do anything unless it is specifically permitted by the government."[71]

The Indian Preference Statutes carefully parallel the jurisdictional boundaries of the Bureau. The Bureau supervises only those Tribes and reservations recognized by the Federal Government.[72] In turn, only members of Federally-recognized Tribes qualify for preference. App. 200. Furthermore, Tribal members are eligible for a preference only at the Bureau of Indian Affairs and the Indian Health Service, and in a very limited way at other bureaus within the Department of the Interior (where Indian programs are involved). App. 197. A Tribal member loses preference by transferring to another agency of the Federal Government.

The Bureau—like the Tribes, and the sweeping power of Congress to regulate their affairs—is sui generis. The District Court erred in confusing this case with cases not in-

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[70] *See*, R. Bennett & F. Hart, *Felix S. Cohen's Handbook of Federal Indian Law* 287-346 (1942 ed.; Univ. N.M. reprint 1971).

[71] Note, *The Indian: The Forgotten American*, 81 Harv. L. Rev. 1818, 1820 (1968).

[72] Although most Tribes are recognized, certain Tribes have never come under the Bureau's jurisdiction while others have been "terminated" by the Federal Government. Members of non-recognized Tribes do not receive preference. App. 200. A recent list of the Tribes and Bands which have been terminated is attached to: Personnel Management Letter No. 73-23 (213), Bureau of Indian

volving the unique Federal-Tribal relationship. Furthermore, as the next section establishes, Congress had a reasonable governmental purpose in attempting to staff the Bureau of Indian Affairs with the people whose affairs it controls.

B. *Indian Preference Statutes Further the Purpose of Providing Indian Tribes With a Means of Self-Government.*

1. Congress Enacted the Indian Preference Statute of 1934 to Ensure That Tribal Indians Would Govern the Agency That Governs Them.

The provisions of the Indian Preference Statute of 1934 reflect a Congressional determination that the obligations of the United States to the Indian Tribes will be met best if the Tribes administer their own affairs.[73] Representative Howard, one of the sponsors of the legislation, declared that:

> "Indian progress . . . will be enormously strengthened as soon as we adopt the principle that the Indian Service shall gradually become, in fact as well as in name, an Indian service predominantly in the hands of educated and competent Indians."[74]

John Collier, Commissioner of Indian Affairs, explained:

> "[T]his bill is designed not to prevent the absorption of Indians in white communities, but rather to provide for those Indians unwilling or unable to compete in the white world some measure of self-government in their own affairs."[75]

Affairs, U.S. Dept. of the Interior (Oct. 5, 1973). The termination program is described in M. Price, *Law and the American Indian* 582-86 (1973).

[73] *Senate Hearings* 19, 256, 259; 78 Cong. Rec. 11123, 11125, 11729, 11731 (1934). *See generally* Krieger, *Principles of Indian Law and the Act of June 18, 1934*, 3 Geo. Wash. L. Rev. 279 (1935).

[74] 78 Cong. Rec. 11731 (1934).

[75] *Senate Hearings* 17.

This Court and the lower Federal courts have recognized and approved the policy of self-determination by the Indian Tribes."[16]

It cannot be said that Congress' decision to staff the Bureau of Indian Affairs with Indians was "purely arbitrary," lacked "some reasonable basis," or in any way amounted to an abuse of its wide discretion in regulating Indian affairs."[17] Congress was shocked by the ineptitude, incompetence, and oppressiveness of the Bureau,"[18] and the

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[16] *See, e.g., Williams* v. *Lee*, 358 U.S. 217, 220 (1959) ("Not satisfied solely with centralized government of Indians [by an Indian agency], it [Congress] encouraged Tribal governments and courts to become stronger and more highly organized); *Bd. of County Comm'rs* v. *Seber*, 318 U.S. 705, 716 n.20 (1943) ("These and other recent statutes reflect a change in policy, the theory of which is that Indians can better meet the problems of modern life through corporate, group, or Tribal action, rather than as assimilated individuals."); *Ex parte Crow Dog*, 109 U.S. 556, 568 (1883) ("The pledge to secure to these people . . . an orderly government, by appropriate legislation . . . necessarily implies . . . the highest and best of all, that of self-government; the regulation by themselves of their own domestic affairs . . . ."); *Mescalero Apache Tribe* v. *Hickel*, 432 F.2d 956, 960 (10th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971) ("[The Indian Preference Statute of 1934] was intended to integrate the Indian into the government service connected with the administration of his affairs. Congress was anxious to promote economic and political self-determination for the Indian.").

[17] *See Perrin* v. *United States*, 232 U.S. 478, 486 (1914).

[18] Senator King commented:

"The Indian Bureau has been incompetent, oppressive, and too indifferent to the needs of the Indian . . . the civil service as applied to the Indians has built up an inefficient and incompetent bureaucracy, under which the progress of the Indians has been interfered with and the individual, economic and moral development has been impeded . . . I hope that a new deal shall come to the Indians; that the Indian Bureau will be reformed and rational and sound policies put into operation." 78 Cong. Rec. 11126-27 (1934).

status of the Indian employees within it."[79] Moreover, the Indian Preference Statute of 1934 was perfectly consistent with previous Congressional legislation dating back a full century.[80]

The reasonableness of the Indian Preference Statutes is also demonstrated by their consistency with the legal status of the Tribes as domestic, dependent nations and the concept of Tribal sovereignty.[81] The Tribal Indians may govern themselves "save when Congress expressly or clearly directs otherwise."[82] The Indian Preference Statutes confirm that right, and provide a centralized instrument, in the form of the Bureau of Indian Affairs, for exercising the right.

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[79] Representative Howard commented:

"The great majority of these positions held by Indians are in the lower salary grades, such as clerks, matrons, cooks, boys' and girls' advisors, and so forth. Considering the higher and technical positions, there are, for example, only eight Indian forecasters in a total forecast personnel of 102; 250 teachers in a total teaching force of 966; 21 nurses out of a total force of 345 nurses; only 8 Indian superintendents out of a total of 102. . . ." 78 Cong. Rec. 11729 (1934).

[80] The Government Brief analyzes in detail the legislative history of the Indian Preference Act of 1934 and its predecessors. The need for additional legislation was explained by Commissioner Collier:

". . . let me give you some startling facts. Look at the employment of the Indians in the regular Indian Service. For years and years it has been common belief that it was time to get Indians in the Indian service. I know that is a policy of the present administration. But what are the facts? In 1900 there were more Indians in the regular Indian Service in proportion to the total number than there are today . . . So, we have this bill to enable the Indian to run his own affairs, to help himself, and to give him the mere privilege of getting a chance to do his own work in the employ of the government." *House Hearings* 38.

[81] *See* Comment, *The Indian Battle for Self-Determination*, 58 Cal. L. Rev. 445, 447-52 (1970).

[82] *United States* v. *Quiver*, 241 U.S. 602, 606 (1916).

Had Congress enacted one of the many proposals suggested during the last century to establish a wholly separate Indian state or territory,[83] there would be no question that the government of such a territory could be limited to its inhabitants. No constitutional issue is raised by the fact that Indian Tribes are scattered on reservations across the United States, and that the Bureau of Indian Affairs must act as a Federal agency rather than as a territorial government. The power of Congress to regulate Tribal matters is not diminished by the dispersion of the Tribes.[84]

Neither this Court, nor any other court except the court below, has ever held that the Fifth Amendment guarantees non-Indians the right to participate in Indian self-government. Indeed, such a "right" would be a contradiction in terms, and would destroy forever the hope that the Tribes "might become a self-supporting and self-governed society." [85]

2. The Indian Preference Statutes Do Not Create Unjustifiable Racial Discrimination.

Appellees' reliance on *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), is misplaced; and the District Court's conclusion that the Indian Preference Statutes apply to "Indians generally" [86] is totally incorrect. The differential treatment provided for in the Indian Preference Statutes is not based solely, or even primarily, on race. Preference is available only to members of federally-recognized Tribes. Both the

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[83] *See* M. Price, *Law and the American Indian* 69-84 (1973).

[84] *Worcester* v. *Georgia*, 31 U.S. 350, 398-99, 6 Pet. 515, 589-91 (1832) (McLean, J., concurring).

[85] *Ex parte Crow Dog*, 109 U.S. 556, 569 (1883).

[86] JSA, App. B at 35; 359 F. Supp. 585, 591 (D.N.M. 1973).

foregoing argument and the testimony in the court below establish this distinction beyond doubt.

Furthermore, as the arguments in the preceding subsections make clear, the differential treatment is necessary to accomplish an important governmental purpose which has been approved by Congress and this Court. The Indian Preference Statutes are a reasonable means by which the members of Indian Tribes, those unique dependent nations recognized by the Constitution, can exercise a degree of control over their own destinies.

The Constitution grants Congress the power to enact special legislation for Indian Tribes.[87] It has exercised this power on so many occasions that its statutes fill an entire title of the United States Code: Title 25. The courts have upheld the constitutionality of statutes that extended benefits to Indians which were unavailable to non-Indians.[88] With the exception of the court below, no court has ever held one of these statutes to violate the Fifth Amendment because it failed to extend benefits to non-Indians as well.

To legislate for the Indian Tribes, Congress has the power to distinguish Indians from non-Indians.[89] To do so, Congress must necessarily use a criterion of race:

> "Indeed, if legislation is to deal with Indians at all, the very reference to them implies the use of 'a criterion of race.' Indians can only be defined by their race."[90]

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[87] *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973); *Bd. of County Comm'rs* v. *Seber*, 318 U.S. 705 (1943); *see* p. 22 *supra*.

[88] *See, e.g., Bd. of County Comm'rs* v. *Seber*, 318 U.S. 705 (1943); *Simmons* v. *Eagle Seelatsee*, 244 F. Supp. 808, 814 (E.D. Wash. 1965), *aff'd per curiam*, 384 U.S. 209 (1966).

[89] *See Cherokee Nation* v. *Hitchcock*, 187 U.S. 294 (1902).

[90] *Simmons* v. *Eagle Seelatsee*, 244 F. Supp. 808, 814 (E.D. Wash. 1965), *aff'd per curiam*, 384 U.S. 209 (1966).

The footnote accompanying the passage just quoted amplifies the necessity for a criterion of race when Congress deals with the Indians:

> "A logical application of plaintiffs' position respecting the unconstitutionality of a 'criterion of race' would cast doubt on all such legislation. Defendants have made this point as follows: 'Let us assume that every statute which has race as the basis of its classification violates the Fifth Amendment as alleged by the Plaintiffs. If this be so, then every statute relating to Indians, qua Indians, is unconstitutional.'" [91]

This Court has indicated that not all classifications based on race are constitutionally impermissible.[92] Furthermore, preference in employment for reasons other than competitive merit is an accepted practice.[93] Because the Indian Preference Statutes rest upon unique constitutional provisions and Congressional powers, because they are vital to an important governmental purpose, because the differential treatment they provide is based primarily on Tribal membership rather than race, and because a race criterion is an unavoidable necessity in Indian legislation, this Court should uphold their constitutionality.

3. The Indian Preference Statutes Continue to Fulfill a Reasonable Governmental Purpose.

The goal of the 1934 Indian Preference Statute has not been achieved. The deplorable condition of life on the reservation has not improved. Indians have about two-thirds the life expectancy, receive about half as much edu-

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[91] *Simmons* v. *Eagle Seelatsee, supra,* 244 F. Supp. at 814 n.13.

[92] *Loving* v. *Virginia,* 388 U.S. 1, 11 (1967). *See also Contractors Ass'n* v. *Sec'y of Labor,* 442 F.2d 159, 176-77 (3d Cir. 1971).

[93] *See, e.g., Elder* v. *Brannan,* 341 U.S. 277 (1951); *Hilton* v. *Sullivan,* 334 U.S. 323 (1948).

cation, and earn between one-third and one-fourth as much income as other citizens.[94] Their health is extremely bad and they lack decent housing.[95] Furthermore, they often cannot speak English and "have cultural patterns that impede dealings with non-Indian agencies."[96]

> "Indian reservations, as alienated socially as urban ghettoes and far more isolated geographically, are the purest examples of underdeveloped enclaves within American society: infant mortality is seventy percent higher than the national average; almost half the Indian labor force is unemployed; the predominant attitude is one of hopelessness."[97]

The Government today recognizes, as it did in 1934, that self-determination is the only way in which the problems of the American Indian may be solved. The President observed in 1970:

> "It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacity and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come . . . to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."[98]

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[94] Message from the President of the United States, H.R. Doc. No. 272, 90th Cong., 2d Sess. 1-2 (1968).

[95] Sclar, *Participation by Off-Reservation Indians in Programs of the Bureau of Indian Affairs and the Indian Health Service*, 33 Mont. L. Rev. 191, 220 (1972).

[96] *Id.*

[97] Note, *The Indian: The Forgotten American*, 81 Harv. L. Rev. 1818, 1838-39 (1968).

[98] Message from the President of the United States, H.R. Doc. No. 91-363, 91st Cong., 2d Sess., 116 Cong. Rec. 23137 (1970).

But the Tribes are not much closer now than they were in 1934 to realizing the self-determination intended by Congress. The President continued:

> ". . . the Indian community is almost entirely run by outsiders who are responsible and responsive to Federal officials in Washington, D. C., rather than to the communities they are supposed to be serving . . . .
>
> "Of the Department of Interior's programs directly serving Indians, for example, only 1.5 percent are presently under Indian control. . . . The result is a burgeoning federal bureaucracy, programs which are far less effective than they ought to be, and an erosion of Indian initiative and morale."[99]

The programs of the Bureau of Indian Affairs continue to be unresponsive to Indian needs; and Indian employment within the Bureau has barely improved over the last thirty years.[100] More significantly, there are still comparatively few Indians in supervisory, technical, administrative and management positions in the Bureau.[101] The expectation that Indians would "rise to the higher administrative and technical posts"[102] of the Bureau was thwarted by the restrictive interpretation of the Preference Statutes taken by the Executive Branch.[103] However, the recent decision in *Freeman* v. *Morton*,[104] extending preference to promo-

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[99] *Id.*

[100] Exhibits submitted by the defendants and the testimony of Mr. Raymond Gunter, Personnel Officer, BIA, show that the status of Indian employees within the Bureau has barely changed. For example, in 1941, there were more Indian employees proportionately in the Bureau than in 1969. *See* Exhibit F, App. 118.

[101] *See* Exhibit E, App. 111.

[102] 78 Cong. Rec. 11731 (1934) (remarks of Rep. Howard).

[103] App. 180-82.

[104] JSA, App. D. The decision is discussed in greater detail in the Statement of the Case, p. 6 *supra*.

tions, reinstatements and reassignments, will undoubtedly hasten the elevation of Indians to higher-level positions in the Bureau.[105] Consequently, Tribal Indians will be able to exercise greater control over their own lives.

The legislative purpose behind the Indian Preference Statutes remains a vital governmental purpose today. If the Bureau implements the strong preference policy envisioned by Congress, the quality of Indian life will improve and Indian employees of the Bureau will be able to contribute more to the self-determination of their people. Just two years ago the President reaffirmed the purpose underlying the Indian Preference legislation:

> "I again urge the Congress to join in helping Indians to help themselves in fields such as health, education, the protection of land and water rights, and economic development. We have talked about injustice to the first Americans long enough. As Indian leaders themselves have put it, the time has come for more rain and less thunder." [106]

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[105] App. 192, 195.

[106] State of the Union Address, H.R. Doc. No. 201, 92d Cong., 2d Sess., 118 Cong. Rec. S. 155 (daily ed., January 20, 1972).

CONCLUSION

The District Court, we submit, erred on an issue of great public importance. Its decision, if permitted to stand, will block implementation of a policy laid down by Congress on numerous occasions, beginning in 1834, and designed to allow the Indian a measure of self-determination. For the reasons set forth in this Brief, the decision should be reversed.

Respectfully submitted,

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